87-656

NO.

Supreme Court, U.S.
FILED
OCT 20 1987
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In the
Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM E. NELSON,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the testimony of an informant, retained by the government to investigate a pre-targeted individual, whose compensation was dependant upon the quality of testimony given by him and the ultimate result of the case, deprived Petitioner of due process of law and fundamental fairness as guaranted by the Fifth Amendment to the United States Constitution?

LIST OF PARTIES IN FIFTH CIRCUIT COURT OF APPEALS

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REFERENCE TO OFFICIAL OR UNOFFICIAL REPORTS OF OPINION

The three judge panel opinion initially rendered by the Fifth Circuit on July 7, 1986 is reported in 793 Fed. 2nd 689. (Appendix, Page 2). Same was substituted, however, by opinion dated September 5, 1986 reported in 800 Fed. 2nd 452. (Appendix, Page 1).

The Government petitioned for rehearing en banc and on August 21st, 1987 the Fifth Circuit sitting en banc rendered its decision affirming the conviction. The opinion has been reported but the cite is unavailable as of this time. (Appendix, Page 22).

PROVISIONS UNDER WHICH JURISDICTION IS INVOKED

The judgment sought to be reviewed herein, rendered by the Fifth Circuit Court of Appeals sitting en banc is dated August 21, 1987. The jurisdiction of this Court is invoked pursuant to the provisions of 28 USC 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the due process clause of the 5th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Appellant William E. Nelson was indicted together with other defendants for:

1. Conspiring to possess with intent to distribute a quantity of marihuana in excess of 1,000 lbs., in violation of Title 21 U.S.C., Sections 841 (a) and 846 (2).

2. Conspiring to unlawfully import into the United States a quantity of marijuana in violation of Title 21, U.S.C., Sections 963, 952 (a) and 960 (a) (1).

He was convicted by the jury that heard the case and his punishment was assessed at four years confinement on each count, to run concurrently.

To convict the Petitioner, the Government relied heavily on the testimony of a paid informer. The evidence developed that the informer's pay depended to a large extent on the outcome of the trial. If his supervisors (Drug Enforcement Administration Agents) were pleased with his testimony and with the outcome of the proceedings, he would be well-rewarded; otherwise he would not, although some compensation would be paid to him in either event.

Appellant timely appealed his conviction to the Fifth Circuit Court of Appeals on the grounds that this practice on the part of the Government denied him the fundamental fairness guaranteed him by the process clause of the 5th Amendment, Petitioner claiming that any testimony so purchased by the Government is inherently untrustworthy and subject to suspicion.

The Fifth Circuit ultimately affirmed his conviction and he now seeks to have that decision reviewed by certiorari.

REASONS THAT WRIT SHOULD BE ALLOWED

Petitioner says that certiorari should be granted herein because:

1. There has been considerable confusion and some conflict between the circuits on the point herein presented.

2. The Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT AND AUTHORITIES

Petitioner was convicted on the strength of testimony given by a witness bought and paid for by the Government. It was clear from the evidence that said witness was operating under a contingent fee arrangement, whereby he would be paid depending on the results obtained. If a conviction was obtained, on the basis of his testimony at the trial, his compensation would be considerable; otherwise it would not, although some compensation would be paid in either event.

Generally speaking, the type of individual that engages in this type of activity is not of exceptionally high moral character. Oftentimes, the paid witness is one of the offenders in the illegal scheme or operation itself. Hence the requirement such testimony be accompanied by a clear instruction to the jury that such testimony is subject to suspicion and should be carefully scrutinized by them.

The reliability and character for truth veracity of such a witness is highly questionable even without the added incentive of a substantial reward should his testimony result is a conviction of the targeted individual. The practice subjects one accused of a crime to substantial risk of

conviction upon perjured testimony.

Needless to say, the due process clause of the 5th Amendment to the U. S. Constitution guarantees to one accused of a crime basic fairness at the trial of his case, and the trial courts are charged with the duty of insuring that this basic right is given force and effect. See *McNabb V. United States,* 318 U.S. 332 (1943).

> ". . . it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from officers in the furnishing of evidence of crimes."

Due process is violated whenever the Government (or the State) embarks upon a course of conduct that ". . . offends those cannons of ethics of decency and fairness which express the notions of justice of English-speaking people. . ." *Rochin V. People of California,* 72 S. Ct. 205 (1952). In keeping with the idea that some conduct on the part of the Government is so reprehensible as to require action on the part of the Court to curtail it, this Court has, for example, excluded evidence obtained in violation of the 4th Amendment rights even though such evidence would have resulted in the conviction of the accused. *Weeks V. United States,* 34 S. Ct. 341 (1914); *Mapp V. Ohio,* 81 S. Ct. 1684 (1961) and *United States Vs. Leon,* 104, S. Ct. 3405, 1984. *Leon* conditioned the exclusive of such evidence on basis of whether or not there was "good faith" on the part of the officers obtaining such evidence.

Similarly, confessions obtained from those accused of crime, without first advising them as to their right to remain silent and their right to counsel, has likewise resulted in exclusion by the Court.

And where the Government has participated in the commission of the offense to an intolerable degree the Courts have allowed one accused of a crime to defend

himself on the basis of entrapment. *Sorrells V. U. S.*, 53 S. Ct. 210 (1932)

Petitioner says that the facts presented by him herein constitute a greater abuse by Governmental authorities than those above set forth, and therefore, presents a greater need for corrective action on the part of the Court in the form of excluding such evidence, the procedure yeilding same being so repugnant as to constitute a violation of due process.

While it is true that the Supreme Court in *Hoffa V. United States,* 87 S. Ct. 408 (1966) held that a conviction based upon the testimony of a witness who is receiving some type of consideration from the Government is valid as against a claim of violation of due process by the accused, is distinguishable from the case at bar in that in Hoffa, the incentive to lie was small while in the case at bar the incentive to lie was great.

Petitioner suggests that the rule set forth in *Williamson V. United States,* 311 Fed 2nd 441 (5th Cir. 1962) is sound and should be approved by this Honorable Court as a necessary rule to protect the rights of the accused in any criminal case and insure that the accused has a fair trial.

As the opinions in the Court below reflect, there has been much confusion among the different circuits regarding the matter of when and under what circumstances, the testimony of the paid informant should be admitted or excluded.

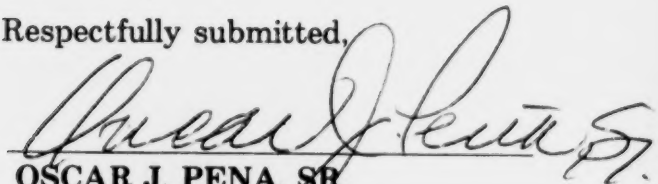
CONCLUSION AND PRAYER

Wherefore, premises considered, Petitioner prays that certiorari be granted in this case and that upon review

by this Court of the ruling of the Court below, this Court reverse Petitioner's conviction.

Petitioner furthermore prays for such other and further relief as he may be entitled to under the law and the facts of this case.

Respectfully submitted,



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State Bar No. 15740000
Attorney for Petitioner
William E. Nelson

CERTIFICATE OF SERVICE

THE STATE OF TEXAS (
COUNTY OF WEBB (

BEFORE ME, the undersigned authority, on this day personally appeared Oscar J. Pena, Sr., known to me, who after being by me first duly sworn, upon his oath deposed and says:

1. My name is Oscar J. Pena, and I am the attorney for Petitioner William E. Nelson in the above matter. I have been admitteed to practice before the Supreme Court of the United States and am, at the present time, a member in good standing of said bar.

2. I hereby certify that on this, the 30th day of October, 1987, I deposited in the U. S. mail first class postage prepaid, a package containing 40 copies of Petitioner's Petition for Certiorari in the above case, complete with appendix, and that such package was duly addressed to the Clerk of the United States Supreme Court, Washington, D. C. for filing, all pursuant to the provisions of 28.2, Rules of the Supreme Court.

3. I furthermore certify that on the same date, I mailed three copies of said Petition for Certiorari complete withh Appendix, to each of the following:

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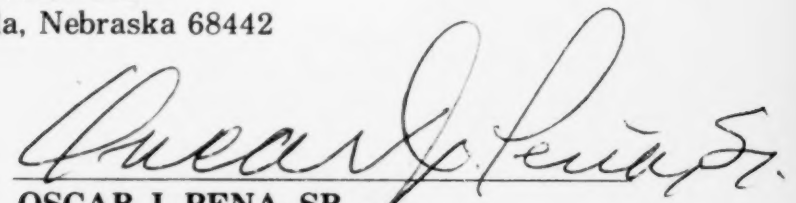

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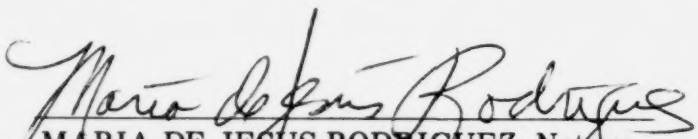
SWORN TO AND SUBSCRIBED before me, by the said Oscar J. Pena, Sr. on this the 20th day of October, 1987, to certify which witness my hand and seal of office.



MARIA DE JESUS RODRIGUEZ, Notary
in and for the State of Texas.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2687

THE UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

ADALBERTO CERVANTES-PACHECO,
JERRY WAYNE NELSON and
WILLIAM E. NELSON,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas

(September 5, 1986)

(Opinion July 7, 1986, 5th Cir. 1986, 793 F.2d 689)

Before GOLDBERG, WILLIAMS and DAVIS, Circuit Judges.

GOLDBERG, Circuit Judge:

The Court substitutes this opinion for its earlier opinion 793 F.2d 689.

This is a criminal appeal involving the characterization of a conspiracy and a claim that the Government hired and compensated its main witness on an impermissible contingent fee basis. We dispose of the conspiracy issue in summary fashion but conclude that the contingent fee claim is a substantial one. Because of its important implications for the standards that govern criminal investigation

procedures, we treat this issue in greater depth and ultimately decide that the contingent fee arangement employed in this case offends principles of due process.

I. Factual and Procedural Background

In April 1984 Frank Kelly, a/k/a Frank Kennedy, a Government informer who had previously worked on more than thirty-five cases, was contacted by his superior, D.E.A. Special Agent Jimmy Bradley, and told to "infiltrate, gather information for intelligence, and report"on William Nelson. Tr. at 297. The activities of Nelson and a number of co-conspirators concluded on or about June 6, 1984. Defendants Nelson and Adalberto Cervantes-Pacheco were arrested, indicted, tried, and convicted of conspiring to possess 200,000 pounds of marijuana with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1) and 846, and conspiring to import marijuana in violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 963. They each received two four-year prison terms to run concurrently; defendant Jerry Wayne Nelson was put on probation. They jointly filed a timely notice of appeal.

Defendants make two points on appeal: (1) The Government proved at most the existence of multiple conspiracies, not the single conspiracy charged in the indictment; all defendants thereby suffered substantial prejudice and their motion for a new trial should therefore have been granted. (2) The testimony of informant Frank Kelly should have been excluded because he had been assigned to make a case against a specific defendant and was paid on a contingent feee basis; Kelly thus had a financial incentive to give damaging testimony, since the amount of his fee was based entirely on the Government's evaluation of his performance in the case, including his testimony.

Single vs. Multiple Conspiracies

Appellant's first contention is without merit. The trial court carefully and thoughtfully instructed the jury on the difference between single and multiple conspiracies and left it free to make a well informed decision on the matter. In a full and fair charge to the jury covering more than five pages in the trial transcript, *see Tr.* at 1550-55, the court dealt with the same issues appellants now raise on appeal and also provided several illustrative examples taken from the trial, *see id.* at 1552-55. And, in fact, the jury acquitted two of the co-defendants, thereby indicating that it retained its powers of discrimination. We are therefore satisfied that appellants' first issue does not merit further discussion.

III. Was the Informant's Fee "Contingent"?

Appellants' second issue requires a more detailed analysis. After examining the record in this case we conclude that the Government's dealings with informant Kelly did indeed describe an impermissible "contingent fee" arrangement that deprived appellants of their fifth amendment right to due process.

A. Deciphering the Law of Contingent Informant Fees

Our cases on the Law of contingent informant fees are based mainly on principles enunciated in *Williamson v. United States,* 311 F.2d 441 (5th Cir. 1962), in which the court reversed a conviction because the Government's informant had been hired under a contingent fee arrangement.[1] *Williamson* held that

[1] *See also United States v. Waterman,* 732 F.2d 1527 (8th Cir. 1984).

> Without some . . . justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up," or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.

Id. at 444. (footnote omitted).[2]

In *Williamson* a former convict, Robert Harris Moye, who had previously specialized in bootleg whiskey operations, contracted Government agents and proposed to put some of his hard-earned experience to good use because, as he succinctly put it, "I wanted to make some money, I had been in the penitentiary three years and not a bootlegger

---

[2] The court noted that under *McNabb v. United States*, 318 U.S. 332, 340 (1943), and its progeny, "it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes." *Williamson*, 311 F.2d at 444.

The court also elaborated on its reference to possible "justification or exploration" as follows:

> It may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis, $200.00 for Williamson and $100.00 for Lowrey, to produce the legally admissible evidence against each of them. It may be also that the investigators carefully instructed Moye on the rules against entrapment and had it clearly understood that Moye would not induce them to commit a crime, but would simply offer them an opportunity for a sale. None of these facts or circumstances were developed in the evidence, though Moye's deposition had been taken months before the trial.

Id.

helped me one bit in the world and not a one of them paid me a nickle he owed me, or paid my wife." *Id.* at 442 (Moye deposition). Moye explained his terms of employment as follows:

> Q. How were they to pay you? Let me put it that way.
>
> A. How was he to pay?
>
> Q. Yes, sir, how were you to be paid, what was the agreement?
>
> A. I was to be paid $200.00 for Big Boy, $200.00 for James McBride, $100.00 for Hogie, he's Big Boy's half brother.
>
> . . . .
>
> Q. What did you agree to do with Mr. Rainer and Mr. Morris? What did they tell you they wanted you to do?
>
> A. They told me to give them the major violators and told me what they'd pay for them.
>
> Q. For you to go out and catch them, in other words?
>
> A. If I could catch them.
>
> Q. And they agreed to pay you $200.00 as to Jack Williamson?
>
> A. Yes, sir.
>
> Q. You all called him Big Boy, I believe?
>
> A. Yes, sir.

Q. And $100.00 as to his half brother, the Lowrey boy?

A. Yes, sir.

Q. When were they to pay you the money?

A. Wasn't nothing said about when it was to be paid.

. . . .

Q. After you had made this arrangement with Mr. Rainer and with Mr. Morris, was there any kind of a written arrangement or anything on it?

A. No, sir.

Q. Just a verbal understanding with those two gentlemen?

A. Yes, sir.

Id. (Moye deposition).

After the usual surreptitious arrangements, Moye managed to purchase some illicit whiskey from Jack Williamson in the presence of an undercover agent. As the court put it, "Moye made the purchase from Williamson and *produced the evidence* against both Williamson and Lowrey." *Id* at 444-45. (emphasis added).

In a brief concurrence Judge Brown noted that *Williamson* was not an entrapment case as such. Rather, it was one in which "the means used to 'make' the case are essentially revolting to an ordered society." *Id.* at 445 (Brown, J., concurring).[3] Judge Brown also emphasized

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[3] *Cf. id.* (Brown, J., concurring):

For Government to offer a specific sum of money to convict a specified suspect is really more than civilized sensibilities can stand.

that a contingent fee arrangement need not be explicit in order to warrant condemnation: "the 'contingent fee' for a narcotics addict hardly needs to be spelled out in the terms used to trap this moonshiner. To get the stuff to feed his uncontrollable appetite, he knows that he must produce results or he will no longer be 'hired' . . . ." *Id.* On this point Judge Brown was joined by Judge Cameron, who acknowledged that

> Every such informer knows that his day to day arrangement with the Government will continue only if he delivers the goods. . . . If the addict succeeds in landing some of the criminals the Government is after, he is well paid and his services will continue. If he does not, he is dropped.

Id. at 446 (Cameron, J., dissenting).

The interpretation of *Williamson* in later cases has been uneven and its significance has thereby been obscrued. In *United States v. Garcia*, 528 F.2d 580 (5th Cir. 1976), this court cited *Williamson* for the proposition that "we have condemned the use of a contingent fee where it involves the promissed payment of a specified sum *to convict* a specified suspect." *Id.* at 586 (emphasis added). In *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976), the court stated that in *Williamson* "we reversed a

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(footnote 3 continued)

. . . .

> What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough--it is just too much. When that occurs, the law must condem it as offensive whether the method used is refined or crude, subtle or spectacular.

conviction for possesion of illicit liquor because the informer who made the government's case had been promised a specified sum of money *for successfully incriminating* the indicated defendants." *Id.* at 942 (emphasis added). In *United States v. Lane*, 693 F.2d 385 (5th Cir. 1982), we provided the following gloss on *Williamson:* "In *Williamson v. United States*, this Court reversed a conviction in which the informer assisting the Government was paid a contingent fee *to implicate* certain targeted defendants." *Id.* at 387 (emphasis added). Similarly, in *United States v. Yater*, 756 F.2d 1058 (5th Cir. 1985), the court noted that "We have limited the *Williamson* holding . . . to cases in which the government directs the informant *to implicate* government-pretargeted specific defendants." *Id.* at 1067 (emphasis added).

These somewhat inconsistent cases interpreting *Williamson* drew attention to a decisive issue: Upon what is an informant's fee impermissibly "contingent"? The following possibilities suggest themselves:

(1) payment after informant's testimony is over;

(2) payment after case is over;

(3) payment dependent on informant's performance;

(4) payment dependent on outcome of case.

These possibilities are listed in the order of increasing "strength" of the contingency. #4 describes the strongest contingency, and if payment is conditioned upon a conviction as the "outcome," then this cort of arrangement is clearly impermissible under our cases. #3 describes a somewhat weaker form of contingency; as detailed below, we conclude that this is the sort of contingency proscribed in *Williamson* and presented by the facts of the present

case.[4]

In *Williamson*, informant Moye testified that he agreed to "go out and catch" the defendants in return for specified sums of money. *Williamson* 311 F.2d at 442. According to Moye, "They told me to give them the major violations and told me what they'd pay for them." *Id.* Moye "caught" the defendants "in the act," so to speak, by arranging for them to consummate an illegal transaction with him in the presence of federal agents. The *Williamson* court concluded that Moye contracted with the Government agents "to produce . . . legally admissible evidence against each of" the defendants. *Id.* at 444. There is no suggestion here, or elsewhere in *Williamson*, that the informant's payments were conditioned upon the *coviction* of the defendants. Instead, it would be more accurate to say, as we put it in *Lane* and *Yater*, that Moye was paid to "implicate" the defendants. *Lane*, 693 F.2d at 387; *Yater*, 756 F.2d at 1067. Thus the *Williamson* situation comes squarely within the arrangement described in #3 above: payment dependant upon the informant's "performance." *Williamson* prohibits the Government from picking out particular individuals for investigation and paying informants if they can implicate those suspects.[5]

---

[1] Since we come to that conclusion we need not decide whether payment of an informant's fee is impermissibly "contingent" as a matter of law merely because it takes place after the informant's testimony (#1) or after the trial (#2). *But see* note 8 *infra*.

[5] Even were *Williamson* to apply only in a case where the informer's fee is contingent on the government garnering a conviction, as the dissent and the Government assert, this is such a case.

A fair and unbiased reading of the record inexorably leads to the conclusion that at least a protion of the informer's fee was contingent on conviction of the defendants. The agent who had primarly responsibility for establishing the fee testified unequivocally that the informer's fee was "dependant on a lot of things," including "how he testified." The government agent, moreover, when asked whether the

B. Pre-targeting Specific Individuals

It emerges unmistakably from the record in this case that the Government's action are of the sort proscribed in *Williamson*. As we have acknowledged elsewhere, "*Williamson* has been subsequently limited to require reversal of a conviction only when the specific defendant was picked out for the informer's efforts by a government agent." *Onori*, 535 F.2d at 942 (citing four 5th Circuit cases). That initial condition is easily met in the present case.

Informant Kelly testified at trial as follows:

Q. All right. What were your instructions? What were you asked to do?

A. I was asked to infiltrate, gather information for intelligence, and report.

(footnote 5 continued)
informer's fee was in part contingent, on the ultimate result in trial, replied "sure." Supp. Rec. 32 (4th Tr.).

The informer solicited and obtained $20,000 from one of the defendants. The informer's fee was $20,000 plus expenses for some 70 days of work. That his pay, with near exactitude, matched the amount confiscated is an unlikely, and unseemly, coincidence. Had the defendnats been acquitted, the government would have had to return the $20,000.

In oral argument, the Government conceded as much. When asked "[w]hat about counsel's argument that the $20,000 pot would probably not have been there had the government not gotton a conviction and . . . [Kelly] probably knew that," counsel for the Government failed to provide a salutary explanation:

> I can't think of any response. I think that it's clear he would have gotton *something* as he had every other case he worked for the government on. I don't think there's any question that that was a *convenient* amount.

(emphasis added)

Q. Any particular individual here in Laredo?

A. Yes. Bill Nelson.

Tr. at 297. Later in his testimony Kelly stated that "my job was to infiltrate and report on Bill Nelson." *Id.* at 312. In the face of this uncontridicted testimony the Government wisely concedes that Nelson was indeed pre-targeted: "In the instant case, informant Kelly was instructed to 'infiltrate, gather information for intelligence, and report' on appellant William Nelson (T.297), and it therefore appears that Nelson was, in fact, a government-pretargeted potential defendant." APpellee's Brief at 31.[6]

(footnote 5 continued)

It may have been convenient to base the informer's pay on the amount of money he was able to extract from the defendant's and retain if they were convicted. But the enduring and timeless Constitutional principles of Due Process and fundamental fairness at trial cannot rest on the evanescent conveniences of paying government informants. It is plain that at least a protion of informer-Kelly's fee was contingent on conviction of these defendants. Therefore, irrespective of whether the *Williamson* rule is triggered when the contingency fee is predicated on "implication" or "conviction," the fee paid to the informer in this case was impermissibly and unconstitutionally tainted.

[6] The dissent asserts that William Nelson's co-defendants, Jerry Wayne Nelson and Cervantes-Pacheco, should not in any event come within the *Willaimson* rule because they were not pretargeted by the Government. We respectfully disagree.

C. Contingent Fee Payments

The record in this case also supports a finding that the Government set up an impermissible contingent fee arrangement with its informant. As in *Williamson*, the informant's payment depended on his performance. In fact, it appears that this case involves an even stronger form of contingency than *Williamson* did. Here, the informant's "performance" included not merely his undercover operations--as in *Williamson*--but also extended to his performance while testifying at trial, thereby directly tainting the factfinding process itself.

Informant Kelly testified as to his terms of employment as follows:

> Q. And how are you paid, sir?
>
> A. I'm paid after a case is over with, anywhere from when the case is over to a year later, depending on Washington. It's Washington's job to tell . . . the Agency that I'm working for would request an amount of money and Washington would approve or disapprove that amount, depending on the way they feel I testified of the way they feel about my infiltrating, gather information, report that information, and testify.

(footnote 6 continued)

The jury found that there was a single conspiracy. By the very nature of a conspiracy, all the defendants were inextricably linked, and therefore "sufficiently connected" so that the *Williamson* rule must be applied to exclude the tainted testimony for *all* the defendants. *See United States v. Dickens*, 524 F.2d 441, 446 (5th Cir. 1975), *cert. denied sub nom. Glenos v. United States*, 425 U.S. 994 (1976).

Tr. at 295 (emphasis added). Later Kelly clarified that testifying at trial was an integral part of his assignemt, and one that determined whether he would be paid:

> A. Initially, when they requested my services, he said, "will you testify," and I said, "Yes." That's it.
>
> Q. So you knew that it's part of your job in this case to testify about your investigation?
>
> A. Yes, sir.
>
> Q. And you knew that you wouldn't be paid until the case was concluded; is that correct?
>
> A. Yes, sir.
>
> Q. And you knew that conclusion of this case meant your testimony in this case?
>
> A. Yes, sir.

Id. at 418-19.

Later at trial agent Bradley testified on the factors he considered in determining how much to pay Kelly. This testimony makes clear that the quality of Kelly's testimony determined whether he would be paid:

> Q. You pay for performance, what they perform?
>
> A. That is correct.
>
> Q. Now, when you figure out this recommendation, do you isolate the different things that the informer had done for you or do you consider it as a whole?
>
> A. I evaluate different aspects of the case and what his participation was in such case.
>
> Q. Do you weigh different aspects against each other when you formulate a final figure, or is there one that just overrides all of them?

A. No, I would say that you take them and combine them altogether and you come up with an evaluation of what you think it's worth.

Q. Okay. So, if I understand you correctly, you were going to weigh these factors in your own mind?

A. That is correct.

Q. Now, are there any set procedures or guidelines that you're aware of that would assist you in weighing different factors of performance?

A. There are no set guidelines, It's strictly up to my discretion.

Q. Okay. I would imagine that there are numerous factors you're going to consider?

A. Yes. Each case is different.

Q. One would be, for instance . . . what, the availability of Mr. Kelly whenever you sought him? In other words, when you picked up the phone, Mr. Kelly answered and he was always there whenever you needed him? That would be a factor, wouldn't it?

A. That would be a factor, yes.

Q. Okay. And the responses that you got from Mr. Kelly, as to whether or not they were complete, that would be a factor?

A. Yes.

Q. And whether or not they were accurate, that would be a factor?

A. Yes.

Q. And his willingness to repeat these responses at a later time would be another factor, Mr. Kelly's performance?

A. You mean, testifying? Yes.

Q. To repeat it anywhere?

A. Right.

Q. You certainly don't want Mr. Kelly to have the authority to say when he will repeat his responses and when he will not; is that correct?

A. I believe he does not have that authority.

Id. at 660-62.

Further, it even appears that if Kelly performed well enough on the stand, his reward would be very $20,000 that the government seized in this case:

Q. (Mr. Zelman resuming) When you make your recommendation, you're going to wait until the end of the case?

A. Yes.

Q. This case is not over, is it?

A. The case is never over until the trial is over.

Q. Okay. And you are right now in the process of evaluating Mr. Kelly; is that correct?

A. I've already evaluated Mr. Kelly.

Q. How did he do?

A. He did great.

Q. You're going to recommend a lot of money for him?

A. I sure am.

Q. What figure?

I'm going to recommend that he gets that twenty thousand dollars he seized.

Q. Now, before Mr. Kelly testified, had you had any figure in mind?

A. No.

Q. So you were going to wait until Mr. Kelly's testimony before you figured how much you were going to recommend he get?

A. That is correct.

Id. at 662-63 (emphasis added). Thus, the quality of the informant's testimony determined not only *whether* he would be paid but also *how much* he would be paid. Needless to say, such an arrangement provides strong financial incentives for giving damaging testimony. Indeed, one might fairly remark that this case provided the entrepreneurial informant a splendid opportunity to "write his own ticket." As the *Williamson* court noted, "The opportunities for abuse are too obvious to require elaboration." 311 F.2d at 444.[7]

---

7 The dissent posits that even if there were an impermissible contingency fee, the fee would be justified "[b]ecause of the government's reasonable suspicion that Nelson was smuggling drugs." Slip op. at 7625. It is true that the Government in this case could reasonably suspect that there was wrongdoing prior to launching its investigation. It is also true that in past cases we have recognized that reasonable suspicion may justify the use of a contingency fee. *Harris v. United States*, 400 F.2d 264, 266; *Sears v. United States*, 343 F.2d 139, 144 (5th Cir. 1965); *Hill v. United States*, 328 F.2d 988,989 (5th Cir. 1964), *cert. denied*, 379 U.S. 851 (1964); *see Williamson.*, 311 F.2d at 444.

But we have also recognized that reasonable suspicion, standing alone, may not be enough to justify an otherwise impermissible contingency fee. Rather, in order to justify the fee, the investigation must be of unusual difficulty. *See Sears*, 343 F.2d at 144. Here, the Government has not argued, nor does the record support an argument, that the investigation was in some way unusually difficult.

Although reasonable suspicion standing alone may sometimes be sufficient to justify a fee contigent on successful *investigation*, this justification is irrelevant and inapposite when the fee is made contingent on the informer's *testimony* at trial. In none of our prior cases have we found it necessary to reach this question, since this is the only case since *Williamson* was decided in which the informer's fee was premised, at least in part, on the quality of the informer's testimony and on the defendant's conviction.

IV. Conclusion

We conclude on the basis of the foreging analysis that the testimony of the Government's main witness, informant Kelly, is inherently untrustworthy and should have been excluded as such.[8] We find no error in the trial court's handling of the conspiracy issue; but on the contingent fee issue we reverse and remand the case to the district court for a new trial.[9]

---

8 We see nothing in *Williamson* or later cases that bars an arrangement under which an informant involves himself with a "targeted" individual and is later compensated, after the job and testimony are over, avording to an objective assessment of the actual time and effort expended and the quality of the services. We would not condemn a payment based on the quality of the informant's work, including the quality of the testimony, so long as that evaluation of quality was determined by the informer's ability to *accurately* and *truthfully* recall the facts. That is not what happened here.

9 The introduction of the tainted testimony was not harmless error. The standard for showing that a constitutional error was harmless is appropriately stringent. A "conviction should . . . be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless *beyond a reasonable doubt.*" *Rose v. Clark*, 54 U.S.L.W. 5023, 5025 (June 26, 1986) (No. 84-1974) (quoting Delaware v. Van Arsdale, 54 U.S.L.W. 4347, 4350 (April 8, 1986)) (No. 84-1279) (emphasis added); *see Chapman v. California*, 386 U.S. 18, 24 (1967).

It is true that much of the informer's testimony was corroborated. *See* slip op. at 7685-7689. But informer-Kelly was the Government's star performer at trial. the case revolved around Kelly and his bartered for testiomony. As Judge Davis notes, "Kelly remained on the witness stand for the better part of a day and testified in excruciating detail about his activity . . . . ." Slip op. at 7690. The Government heavily relied on Kelly's testimony to convict the defendants. As the Government prosecutor put it at trial, "Kelly will be the one . . . that will tie it all up." Tr. 272. Reading the record as a whole, we cannot confidently say that without Kelly's testimony the Government would have proved beyond a reasonable doubt that the defendants conspired to bring marijuana into the United States.

One of the basics of our jurisprudence is the search for truth, and by this is meant not the purchased truth, the bartered-for truth, but the unvarnished truth that comes from the lips of a man who is known for his integrity. A corollary of our search for truth, a component thereof, is that the plaintiff or defendant, prosecution or defense, as the case may be, vouches for the truthfulness and the integrity of its witnesses. The government in its prosecutorial efforts should be like Caesar's wife, above or beyond reproach. At the very least, the court must tell a jury that the words of a witness have been in a sense purchased if he will be paid, more or less, depending upon how effective his putative truth-telling sells itself to the jury. It may be that we must live with informers. It may be that we must live with bargained-for pleas of guilty. But we do not have to give a receipt stamped "paid in full for your damaging testimony" or "you will be paid according to how well you can convince the jury even though it be in the face of lies."

It is true that the precedents we cite are timid in their approach to this problem, fearful that somehow the condemnation of contingent fee arrangements will destroy our criminal justice system. If that be true, then our system of finding the truth is pallid and weak and not to be trusted. Trustworthiness is a keystone and a hallmark of any judicial system that seeks recognition for its role in a civilized society. The time has come to announce boldly and firmly that our juridical search for the truth cannot be reconciled with the virtual purchase of perjury.

REVERSED AND REMANDED FOR A NEW TRIAL

Judge Davis adheres to his original dissent, 793 F.2d 695.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-2687

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADALBERTO CERVANTES-PACHECO,
JERRY WAYNE NELSON and
WILLIAM E. NELSON,

Defendants-Appellants

Appeals from the United States District Court for the Southern District of Texas

August 21, 1987

Before CLARK, chief judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges:

W. EUGENE DAVIS, Circuit Judge:

Appellants, Adalberto Cervantes-Pacheco, Jerry Wayne Nelson and William E. Nelson, along with five other co-defendants, were charged in a two-count indictment with conspiracy to possess more than 1,000 pounds of marijuana with intent to distribute, 21 U.S.C. §§ 841(a), 846, and conspiracy to import marijuana from Colombia into the United States. 21 U.S.C. §§963, 952(a)(1). After a jury trial, each appellant was convicted of both charges. We affirm.

The evidence at trial revealed an active criminal enterprise engaged in importing marijuana from Colombia into the United States that extended from December 1983 until June 1984. Appellant Adalberto Cervantes-Pacheco and Humberto Santos funded the drug-smuggling enterprise and provided the Colombian source for the marijuana. Ronald Sharp worked for Santos and introduced Santos to appellant William Nelson. Nelson's role in the conspiracy was to pilot his DC7 airplane and transport the drugs into the United States. Appellant Jerry Wayne Nelson helped his brother William Nelson with airplane mechanics and accompanied his brother on the flights to Jamaica and Colombia.

Frank Kelly, who was an experienced pilot, worked as an undercover investigator for the government and infiltrated the drug-smuggling conspiracy by offering to assist in transporting the marijuana. In exchange for his flying services, Kelly received a $20,000 advance from Nelson. After receiving this advance, which was paid on behalf of the drug-smuggling enterprise, Kelly promptly turned over the entire $20,000 to federal investigators.

Kelly previously had worked as a government informer in more than thirty-five cases. Kelly's supervisor, DEA Special Agent Jimmy Bradley, told Kelly to "infiltrate, gather information for intelligence, and report" on William Nelson. Kelly understood that he would be required to testify if Kelly's information led to the indictment and trial of Nelson or other participants in the enterprise.

Kelly's compensation from the government included a per diem, expenses, and a payment at the conclusion of the case based on the government's evaluation of his overall performance. Kelly testified that he did not know what criteria the government used to fix his fee in a

particular case, but that he understood the amount was set by federal officials in Washington. Kelly testified that he could not predict from fees he had earned in previous cases the amount of his fee in this case; the amount of his fee did not depend, however, upon the ultimate outcome of the case or on the arrest or conviction of any defendant.

DEA agent Bradley testified after Kelly completed his testimony. Bradley testified that he was responsible for recommending to his superiors in Washington the amount of Kelly's compensation in this case. Based on a subjective evaluation that Kelly's overall performance was "great," Bradley testified that he was going to recommend that Kelly be paid a fee of $20,000, the same amount Kelly had previously received from the drug-smuggling enterprise and turned over to federal investigators.

Only two issues were raised on appeal: (1) whether the district court erred by denying a motion for new trial because the government proved at most the existence of multiple conspiracies, not the single conspiracy charged in the indictment; and (2) whether the district court erred in allowing Kelly to testify in view of the government's fee arrangement with him. We agree with the panel's rejection of appellants' argument on the first issue. *United States v. Cervantes-Pacheco,* 800 F.2d 452, 454 (5th Cir.1986). We granted rehearing en banc to reconsider the panel's disposition of the second issue. The panel concluded that the government's payment of a contingent fee to its informant, Kelly, disqualified Kelly as a witness and required reversal of the defendants' conviction under "*Williamson v. United States,* 311 F.2d 441 (5th Cir. 1962). For the reasons that follow, we overrule *Williamson* and affirm the convictions in the instant case.

II.

a.

In *Williamson*, the government utilized an informer named Robert Moye to infiltrate the bootlegging operation of Jack Williamson and Lee Lowrey. *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962). the government agents told Moye that they would pay him $10 per day in expenses, as well as $200 if he could "catch" Williamson, and another $100 for Lowrey. the court explained that:

> It may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis, $200 for Williamson and $100 for Lowrey, to produce the legally admissible evidence against each of them. It may also be that the investigators carefully instructed Moye on the rules against entrapment and had it clearly understood that Moye would not induce them to commit a crime, but would simply offer them an opportunity for a sale. None of these facts or circumstances were developed in the evidence though Moye's deposition had been taken months before trial.
>
> Without some such justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up" or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.

Id. at 444 (emphasis added). the court reversed Williamson's conviction and held that "Moye's testimony, standing alone and unexplained, discloses a form of employment of an informer which this Court cannot approve or sanction." *Id.*

B.

Although *Williamson* established a *per se* rule that an informant paid a contingent fee is not a competent witness, we have not reversed a conviction based on the rule since *Williamson.* Instead we have riddled the rule with exceptions, many of which apply to the instant case. For example, we have held that *Williamson* and its progeny do not apply unless the payment of the fee is made contingent on conviction of a *pretargeted* individual. *United States v. Garcia,* 528 F.2d 580, 587 (5th Cir.1976). In *Garcia,* we refused to extend *Williamson* to the situation "where an informant is paid a subsistence allowance and given a reward, as long as there is no evidence that he had been promised a specific sum to convict a particular person." *Id.* at 586 (citations omitted).

We have found a second exception to *Williamson* when the government knows that the targeted individual was engaged in illicit activity prior to the institution of the contingent fee arrangement. *Harris v. United States,* 400 F.2d 264, 266 (5th Cir. 1968); *Sears v. United States,* 343 F.2d 139, 144 (5th Cir.1965); *Hill v. United States,* 328 F.2d 988, 989 (5th Cir. 1964). As *Williamson* itself stated, "it may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis...." *Williamson,* 311 F.2d at 444.

We have also declined to reverse a conviction when

the *informant's testimony is fully corroborated at trial.* In *Henley v. United States,* 406 F.2d 705, 706 (5th Cir. 1969), we explained that "the combined testimony of agent Navarro and Michael Henley himself fully corroborated [the informant's testimony. Thus, the jury was not required to base its verdict solely on the testimony of a man who admittedly is not a sterling characted."

In addition, the cases are conflicting on whether *Williamson* only prohibits the government from agreeing to pay a fee contingent on *conviction* or whether its prohibition also applies to the government's agreement to pay a fee contingent on *implication* of a suspect or some other governmental objective short of conviction. Compare *United States v. Lane,* 693 F.2d 385, 387 (5th Cir. 1982) (*Williamson* prohibits fees contingent on implication) with *United States v. Gray,* 626 F.2d 494, 499 (5th Cir.1980) (*Williamson* prohibits fees contingent on conviction).

Thus, because of the exceptions and distinctions to the *Williamson* rule, we have virtually limited *Williamson* to its facts. *United States v. McClure,* 577 F.2d 1021, 1022 (5th Cir. 1978). In the process, however, we have vastly complicated the district court's job of determining whether a paid informant may testify and if the witness does testify what special instructions it should give to the jury.

C.

The Supreme Court and four other circuits have rejected the *Williamson* rule of per se exclusion either expressly or in principle. In *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d374 (1966), the Supreme Court affirmed a bribery conviction even though it was based in part upon the testimony of an informant who was compensated by the government for his assistance. In return for his assistance, the informant's wife received four monthly

installment payments of $300 from government funds, and the state and federal charges against the informant were either dropped or not actively pursued. *Id.* at 298, 87 S.Ct. at 411. The Court rejected the argument that the receipt of these benefits created an impermissible risk that the informant might perjure himself. *Id.* at 311, 87 S.Ct. at 418.

> The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury. At the trial of this case, Partin was subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently explored. The trial judge instructed the jury, both specifically and generally, with regard to assessing Partin's credibility. The Constitution does not require us to upset the jury's verdict.

Id. at 311-12, 87 S.Ct. at 418 (citations omitted).[1]

Considering the strong policy articulated by the Court in *Hoffa* that the credibility of witnesses is to be determined by the jury, it is not surprising that no circuit court has embraced *Williamson.* Predictably, four circuits have expressly rejected *Williamson. United States v. Jones,* 575 F.2d 81, 86 (6th Cir.1978); *United States v. Hodge,* 594 F.2d 1163, 1165-67 (7th Cir.1979); *United*

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[1] *cf. United States v. Murphy,* 41 U.S. (16 Pet.) 203, 209, 10 L.Ed. 937 (1842) ("a person who is to receive a reward for or upon the conviction of the offender ... is universally recognized as a competent witness.") (Story, J.).

States v. Dailey, 759 F.2d 192, 199-200 (1st Cir.1985); *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1338 & nn. 18-19 (9th Cir.1977). For example, the Sixth Circuit has stated that:

> [There is no overriding policy to exclude the testimony of an informant if he is paid under] a contingent fee agreement for the conviction of specified persons for crimes not yet committed. Although it is true that the informant working under this type of arrangement may be prone to lie and manufacture crimes, he is no more likely to commit these wrongs than witnesses acting for other, more common reasons.... Rather than adopting an exclusionary rule for a particular factual situation, ... we prefer the rule that would leave the entire matter to the jury to consider in weighing the credibility of the witness-informant. In our view this approach provides adequate safeguards for the criminal defendant against possible abuses since the witness must undergo the rigors of cross-examination.

Jones, 575 F.2d at 86 (quoting *United States v. Grimes*, 438 F.2d 391, 395-96 (6th Cir.1971)) (emphasis in original) (citations omitted).

Jones affirmed a conviction for the interstate transportation of firearms based in part upon evidence procured by paid informants. As part of the investigation in *Jones*, the government paid a per diem and an award to two acquaintances of the defendant who were instructed to buy fire-arms from the defendant. *Id.* at 82-83. the government promised to recommend a $1,000 award, depending on whether the investigation was successful. *Id.* Although the paid acquaintances of the defendant did not testify at trial, the government agents testified regarding the paid informants' successful purchase of fire-arms from the defendant.

Id. at 83. Rejecting *Williamson*, the court found no due process violation in the use of a contingent fee and declined to reverse the conviction. *Id.* at 86.

Similarly, the Seventh Circuit has declined to apply "a *per se Williamson* rule that all contingent fee arrangements with informers are invalid." *Hodge*, 594 F.2d at 1167. *Hodge* involved a paid government informant who was assigned to investigate several different drug traffickers. *Id.* at 1166. The informant's compensation depended on whether he contacted or purchased narcotics from anyone within the narcotics organizations being investigated. *Id.* the informant had worked with police on three prior occasions and provided information which was corroborated by independent sources. *Id.* the Court rejected the argument that the testimony of the paid government informant should have been excluded. "The method of payment is properly a matter for the jury to consider in weighing the credibility of the informant." *Id.* at 1167.

We followed the *Hoffa* rationale in *United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983). the convictions in *Kimble* were based in part on the testimony of Steve Thomas Simoneaux, who agreed to cooperate with federal authorities in exchange for a favorable sentencing agreement. *Id.* at 1255. Conditioned on the adequacy of his cooperation, Simoneaux was to be sentenced to twenty years imprisonment to run concurrently with sentences in Texas for armed robbery. *Id.* In addition, Simoneaux was given immunity from testimony-related federal offenses, and federal authorities agreed not to furnish information on state crimes to state authorities. *Id.*

The Court in *Kimble* rejected the argument that Simoneaux's testimony was per se incredible because of the plea arrangement. *Id.* at 1256. Considering that Simoneaux was extensively cross-examined about the precise nature

of the plea agreement, *Id.*at 1255, the court found no reason to exclude the testimony or reverse the convictions. *Id.* at 1257. "The jury had both the power and duty to determine whether Simoneaux was to be believed in whole or in part," the court explained, and "the plea agreement ... went to the weight of Simoneaux's testimony, not its admissibility."*Id.* at 1257.

D.

[1] No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility.[2] A witness such as Kelly who is paid a fee for his services has less an inducement to lie than witnesses who testify with promises of reduced sentences. It makes no sense to exclude the testimony of witnesses such as Kelly yet allow the testimony of informants such as those in *Hoffa* and *Kimble* who are testifying with the expectation of receiving reduced sentences. We therefore join our sister circuits, discussed above, who have faced this problem and conclueded that the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way. We therefore hold that an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial. As in

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[2] See *United States v. Dailey*, 759 F.2d 192, 198-200 (1st Cir.1985) (collects cases allowing testimony of informants who have been promised reduced sentences).

the case of the witness who has been promised a reduced sentence, it is up to the jury to evaluate the credibility of the compensated witness.

Our holding today is bolstered by the policy implications of a contrary result. The *per se* exclusion of whole categories of evidence. It is a fundamental tenet of those rules that, with few exceptions, "all relevant evidence is admissible," Fed.R. Evid. 402, and "every person is competent to be a witness," Fed.R.Evid. 601. The facts of this case argue strongly against the adoption of a per se rule that disqualifies the compensated informer from testifying as a witness. The appellants do not argue that Kelly's testimony was false or that he perjured himself. In fact, Nelson admitted virtually all of the facts elicited during Kelly's testimony, much of which was corroborated by other witnesses. Thus the concern over the truthfulness of a compensated witness that drove *Williamson* to adopt a per se rule is totally aabsent in this case and demonstrates whyu it is unwise for us to adhere to the *Williamson* rule.

We also recognize that is is sometimes necessary to compensate an informant before he will agree to undertake the often dangerous task of undercover investigation. "Few would engage in a dangerous enterprise of this nature withou assurance of subtantial remuneration." *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1338 n. 19 (9th Cir. 1977). It is simply unreasonable to expect the government "to depend exclusively upon the virtuous in enforcing the law." *United States v. Richardson*, 764 F.2d 1514, 1521 (11th Cir. 1985).

[2] Adequate reles are in place to protect against abuses. the government of course must not deliberately use perjured testimony or encourage the use of perjured testimony. *Napue v. Illinois*, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 1177-78, 3 L.Ed.2d 1217 (1959); *Hart v. United*

States, 565 F.2d 360, 362 (5th Cir. 1978). the government must also make a complete and timely disclosure to the accused of the fee arrangement it has made with the informant in accordance with *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215(1963). *United States v. Bagley*, 473 U.S. 667, 675-84, 105 S.Ct. 3375, 3380-85, 87 L.Ed.2d 481, 490-95(1985). The accused must have an adequate opportunity to cross-examine the informant and government agents about any agreement to compensate the witness. *Id.* at 677, 105 S.Ct. at 3381, 87 L.Ed.2d at 491. Finally, the trial court should give a careful instruction to the jury pointing out the suspect credibility of a (fact) witness who has been compensated for his testimony. *United States v. Beard*, 761 F.2d 1477, 1481 (11th Cir.1985).

III.

In summary, we hold that the credibility of the compensated witness, like that of the witness promised a reduced sentence, is properly instructed jury to determine. Accordingly, we overrule *Williamson* and it per se exclusionary rule.

We remain confident in the jury system and the ability of the jury to weigh the defendant's arguments about the inherent unreliability of "purchased" testimony. For reasons stated above we are persuaded that a per se rule declaring the compensated informant incompetent to testify is neither wise nor necessary.

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, concurring:

The employment of a witness for a fee contingent upon victory for the party in whose favor he testifies is a

violation of both the Model Rules of Professional Conduct[1] and the Code of Professional Responsibility.[2] Yet, because a person interested in the outcome of a case is a competent witness, experts employed on such a contingent-fee basis have been permitted to testify.[3] No court, so far as I have been able to find, now excludes contingent-fee testimony. The prosecuting attorney is therefore permitted to adduce evidence in a criminal case despite the fact that it is gained by a breach of ethical standards. As the majority opinion points out, the government may also offer witnesses plea bargains for either a reduced sentence or immunity in exchange for their testimony and thus provide an incentive greater even than a contingent fee. If the government may do so, the defendant presumably may also employ experts and other witnesses to testify for a fee contingent on his acquittal. While this balances opportunity equally, it patently permits perversion of the trial process, and I am therefore troubled by the possible results of our decision. Because, however, both the Supreme Court decision in *Hoffa v. United States*[4] and the decisions of every other circuit appear to sanction the use of such testimony, I concur in the result.

Goldberg, Circuit Judge, with whom JERRY S. WILLIAMS, Circuit Judge joins, dissenting:

Adhering to the views expressed in the panel opinion, I respectfully dissent. The truth has no marketplace.

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[1] Model Rules of Professional Conduct Rule 3.4 (1983).

[2] Model Code of Professional Responsibility DR 7-109 (1980).

[3] *Petition of Shore*, 93 *Misc.*2d 933, 403 N.Y. S.2d 990, 993 (1978); *New England Telephone & Telegraph Company v. Board of Assessors of Boston*, 392 Mass. 865, 468 N.E.2d 263, 268 (1984).

[4] 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

I write only to express three simple propositions. First, notwithstanding the majority's conclusion to the contrary, I continue to believe that Kelly's contingent fee depended upon the outcome of the case and the quality of his testimony. Second, the *Williamson* rule not only is wise policy, it is necessary to protect the very integrity of the judicial system and to ensure that testimony will not be bought. Third, that plea-bargaining creates incentives to lie does not point out the lack of problems with contingent fees and associated testimony, but rather the presence of problems with plea-bargaining and associated testimony.

These simple propositions recall the eloquent words of Justice Brandeis:

> The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination....
>
> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example....To declare that in the administration of the criminal law and end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retributiion. Against that pernicious doctrine this court

Olmstead v. United States, 277 U.S. 438, 484, 48 S.Ct. 564, 574-75, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (footnote omitted).

(2)

No. 87-656

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM E. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether petitioner's due process rights were violated by the admission of the testimony of an informant who was promised a fee contingent on the government's evaluation of his overall performance at the conclusion of the case.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-656

WILLIAM E. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals panel (Pet. App. A1-A18) is reported at 800 F.2d 452. An earlier opinion of the panel is reported at 793 F.2d 689. The opinion of the en banc court of appeals (Pet. App. A19-A33) is reported at 826 F.2d 310.

JURISDICTION

The judgment of the en banc court of appeals was entered on August 21, 1987. The petition for a writ of certiorari was filed on October 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to import marijuana (Count II) and conspiracy to possess marijuana with intent to distribute it (Count I), in violation of 21 U.S.C. 841(a)(1), 846, 952(a), 960(a)(1), and 963. He was sentenced to concurrent four-year terms of imprisonment on each count. The court of appeals, sitting en banc, affirmed (Pet. App. A19-A33).

1. The evidence, the sufficiency of which is not challenged, is summarized in the government's supplemental brief before the en banc court (Supp. Br. 2-4). On December 19, 1983, petitioner met with co-conspirator Humberto Santos and Ronald Sharp and agreed to participate in a marijuana-smuggling venture. Pursuant to the plan, petitioner agreed to provide an airplane and a crew to fly marijuana from Colombia to a small airstrip near Laredo, Texas. After showing Sharp and Santos the airstrip that he had selected, petitioner asked for $250,000 "up front" to pay the expenses of the venture, plus a commission of $40-50 for each pound of marijuana.

Within the next several days, petitioner repeatedly contacted the DEA, recounted details of the scheme to import 20,000 pounds of Colombian marijuana, and offered to act as an informant. The DEA rebuffed petitioner's request that the agency supply him with the needed aircraft; however, petitioner was asked to keep the DEA posted on the progress of the smuggling venture. Petitioner never again reported to DEA agents after December 23, 1983. Supp. Br. 3.

On December 26, 1983, petitioner flew to Miami "to pick up the money" for the smuggling venture. At a meeting with Sharp, Santos, and co-defendant

Adalberto Cervantes-Pacheco, petitioner received from Cervantes-Pacheco a wrapped Christmas package containing $150,000; petitioner gave Sharp $10,000 and kept the remaining $140,000 for himself. Petitioner thereafter returned to Texas. During the next three months, petitioner flew three aborted missions designed to import Colombian marijuana; the first ended when his plane crashed, and the other two ended when he jettisoned the marijuana before landing. Supp. Br. 3.

In the spring of 1984, a fourth operation was planned to import 200,000 pounds of Colombian marijuana by air. Pursuant to this plan, petitioner hired Frank Kelly as a pilot in April 1984. Kelly was a DEA undercover investigator. After receiving word from Santos in late May that the marijuana was ready for transport, Sharp proceeded to Laredo, where he met petitioner and Kelly. As the plan was portrayed, Sharp and Cervantes-Pacheco were to remain in Laredo to "mak[e] sure that the plane g[o]t off the ground"; Santos was to handle the loading of the plane with marijuana in Colombia; co-conspirator "Beto" was to handle offloading operations in Mexico; and co-defendant Jerry Nelson was to reload the marijuana in smaller airplanes so that it could be "circle dropped" at a designated drop zone north of Laredo. During that time, petitioner also demanded an additional $58,000 in "up front" and expense money. Co-conspirator "Beto" provided the additional funds to Sharp, who in turn relayed them to petitioner; at petitioner's direction, Sharp gave Kelly $20,000 for his services. The conspiracy ended on June 6, 1984, before any marijuana was imported. Supp. Br. 3-4.[1]

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[1] Testifying at trial, petitioner admitted the existence of the drug importation conspiracy as outlined by Sharp and

2. The trial evidence further showed that Kelly, who had worked as an "undercover investigator" on 35-40 occasions since 1969 (Tr. 294-296, 449), was contacted in April 1984 by DEA Agent Jimmy Bradley and asked to "infiltrate, gather information * * * and report" on petitioner (Tr. 296-297; see also Tr. 312, 461). In addition to per diem and expenses, Kelly was to receive a payment at the conclusion of the case contingent on the government's evaluation of his overall performance (Tr. 295). Kelly testified that he never discussed payment with the government (Tr. 399, 413-414), that he did not know what criteria the government used in determining his payment in a particular case (Tr. 404), and that he never knew what he would be paid until a case was over (Tr. 385-386, 443-444, 504). As Kelly repeatedly stated, the final amount was always dependent on federal officials in Washington (Tr. 385, 399, 403-404, 421, 479). Kelly unequivocally testified that the amount of the payment did not depend on the ultimate outcome of the case (Tr. 460-461) or on the arrest or conviction of any defendant (Tr. 403-405). Nor did it necessarily depend on the size of the case or whether the case actually went to trial (Tr. 404, 459-460, 479).

DEA Agent Bradley confirmed that he was responsible for recommending to his superiors in Washington the amount Kelly should be compensated (Tr. 659-661, 664). In making recommendations, Agent Bradley subjectively "evaluate[d] different aspects of the case and what [the informant's] participation was in such a case" (Tr. 660). In particular, Agent

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Kelly; however, petitioner claimed that he had only pretended to participate in the venture, in order to sabotage its chances for success.

Bradley considered whether the informant was available when needed, whether he gave complete and accurate information, and whether he was willing to testify (Tr. 661-662). Agent Bradley determined that Kelly had done a "great" job in this case (Tr. 663) and that his cooperation was worth $20,000 (Tr. 663-664)—an evaluation that Agent Bradley reached before Kelly testified (Tr. 681-682). Agent Bradley had not discussed his recommendation with Kelly (Tr. 683).

3. After the government rested, petitioner moved to dismiss the indictment (Tr. 697-698) on the ground that Kelly had received a contingent fee of the sort condemned in *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962).[2] The district court denied the motion, finding both that Kelly was not promised a fee contingent on the conviction of a particular suspect and that the government had reason to believe that petitioner was involved in drug smuggling when it hired Kelly to investigate petitioner's activities (Tr. 698-700).

4. Although a divided court of appeals panel reversed (Pet. App. A1-A18), the court sitting en banc affirmed petitioner's convictions by a vote of 12

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[2] In *Williamson*, the court of appeals reversed the defendants' convictions after an informant was offered a specific sum to "catch" two identified suspects. The *Williamson* court stated (311 F.2d at 444 (footnote omitted)):

> Without some * * * justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up" * * *. The opportunities for abuse are too obvious to require elaboration.

See also *id.* at 445 (Brown, J., concurring).

to 2 (*id.* at A19-A33). At the outset, the en banc court overruled its prior decision in *Williamson.* Rather than subjecting a paid informant's testimony to a "per se exclusionary rule," the en banc court held that "the credibility of the compensated witness * * * is [for a] properly instructed jury to determine" (*id.* at A30). As the court explained (*id.* at A28-A29 (footnote omitted)):

> No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility. A witness such as [the informant here] who is paid a fee for his services has less an inducement to lie than witnesses who testify with promises of reduced sentences. It makes no sense to exclude the testimony of witnesses such as [the informant here] yet allow the testimony of informants * * * who are testifying with the expectation of receiving reduced sentences. We therefore * * * [conclude] that the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way. We therefore hold that an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial. As in the case of the witness who has been promised a reduced sentence, it is up to the jury to

evaluate the credibility of the compensated witness.

In reaching this result, the en banc court expressly noted that there was no allegation in this case "that Kelly's testimony was false or that he perjured himself" (Pet. App. A29). Nor would its holding create an undue risk of perjury in future cases. As the court noted, there were already "[a]dequate r[u]les * * * in place to protect against abuses" in the form of discovery requirements, cross-examination, and cautionary jury instructions (*id.* at A29-A30). When such procedures are followed, the court stated, it was fully "confident in * * * the ability of the jury to weigh the defendant's arguments about the inherent unreliability of 'purchased' testimony" (*id.* at A30).

Judge Rubin, concurring, observed that the court's decision was supported by *Hoffa* v. *United States*, 385 U.S. 293 (1966), and by "the decisions of every other circuit" (Pet. App. A31). Judge Goldberg, dissenting, adhered to the view expressed by the panel majority that the payment of contingent fees amounted to "the virtual purchase of perjury" and, accordingly, that Kelly's testimony was "inherently untrustworthy and should have been excluded as such" (*id.* at A17-A18, A31-A32).

ARGUMENT

Petitioner contends (Pet. 2-4) that Kelly's testimony should have been excluded because of Kelly's contingent fee arrangement with the government. In petitioner's view, this arrangement created a "substantial risk of conviction upon perjured testimony" and, as such, was "so repugnant as to constitute a violation of due process" (*ibid.*). As the en banc court of appeals correctly noted (Pet. App. A24),

however, the per se rule of exclusion that petitioner urges has been "rejected * * * either expressly or in principle" both by this Court and by every other circuit that has considered the issue. The Due Process Clause should not be interpreted to exclude testimony pursuant to a contingent cooperation agreement, as long as the substance of the agreement is not concealed and defense counsel has a full opportunity to cross-examine the witness about the terms of the agreement.

At common law, testimony by the defendant, accomplices, and other interested persons was routinely prohibited on the ground that "erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." *Washington* v. *Texas*, 388 U.S. 14, 21 (1967) (footnote omitted). That practice eroded over time and has now been firmly rejected in favor of a rule that permits the jury to decide on the credibility and weight of testimony in light of all relevant factors. The modern practice rests on the recognition (*Rosen* v. *United States*, 245 U.S. 467, 471 (1918)) that

> the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent * * *.

See also *Washington* v. *Texas*, 388 U.S. at 22. The Federal Rules of Evidence incorporate the modern rule. See Fed. R. Evid. 402 ("[a]ll relevant evidence is admissible," except as otherwise provided); Fed. R. Evid. 601 ("[e]very person is competent to be a

witness," except as otherwise provided); see also Fed. R. Evid. 601 advisory committee note (rule represents a "general ground-clearing [that] eliminates all grounds of incompetency not specifically recognized" by other rules, including "connection with the litigation as a party or interested person").

In applying the modern rule, federal courts have routinely concluded that testimony obtained in exchange for a promise of favorable treatment is admissible. Such testimony does not raise due process concerns, even though the witness has an obvious incentive to lie. This Court has explained that the existence of such an incentive does not render testimony "constitutionally inadmissible," since "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966); see also *Lisenba* v. *California*, 314 U.S. 219, 227 (1941); *Benson* v. *United States*, 146 U.S. 325, 334-337 (1892); *United States* v. *Murphy*, 41 U.S. (16 Pet.) 203 (1842) (owner of stolen goods was a competent witness despite his eligibility to receive a portion of the fine on conviction). The courts of appeals likewise have held that there is no violation of fundamental fairness merely because an accomplice testifies as a government witness in exchange for a promise of favorable treatment. See *e.g.*, *United States* v. *D'Antignac*, 628 F.2d 428, 435-436 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Mills*, 597 F.2d 693, 697 (9th Cir. 1979); *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976); *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir.

1975); *United States* v. *Spivey*, 448 F.2d 390, 391 (4th Cir. 1971), cert. denied, 405 U.S. 927 (1972); *United States* v. *Insana*, 423 F.2d 1165, 1168-1169 (2d Cir.), cert. denied, 400 U.S. 841 (1970).

In addition, the courts of appeals have uniformly held admissible the testimony of informant-witnesses who have received fees contingent on the value of their services. Although such fee arrangements may create an incentive to lie, the courts have recognized that "there are strong public policy justifications for permitting law enforcement officials to offer additional incentives to encourage citizens to come forward with knowledge of crimes." *United States* v. *Walker*, 720 F.2d 1527, 1540 (11th Cir. 1983), cert. denied, 465 U.S. 108 (1984). Rather than excluding such testimony on a case-by-case basis, the courts have found it preferable to "leave the entire matter to the jury to consider in weighing the credibility of the witness-informant." *United States* v. *Grimes*, 438 F.2d 391, 396 (6th Cir.), cert. denied, 402 U.S. 989 (1971); accord *United States* v. *Valona*, No. 86-2817 (7th Cir. Nov. 20, 1987), slip op. 19 ("Treating fee arrangements with witness/informants as a credibility factor for the jury rather than an outrageous conduct issue appears to be a more reasoned approach."); *United States* v. *Cresta*, 825 F.2d 538, 545-548 & n.6 (1st Cir. 1987); *United States* v. *Spector*, 793 F.2d 932, 937 n.3 (8th Cir. 1986), cert. denied, No. 86-621 (Jan. 12, 1987); *United States* v. *Dailey*, 759 F.2d 192, 199-200 (1st Cir. 1985); *United States* v. *Hodge*, 594 F.2d 1163, 1167 (7th Cir. 1979); *United States* v. *Jones*, 575 F.2d 81, 85-86 (6th Cir. 1978); *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1338 & n.19 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978); *United*

States v. *Crim*, 340 F.2d 989 (4th Cir. 1965); see also *United States* v. *Waterman*, 732 F.2d 1527, 1533 (8th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985). In fact, we know of no case in the quarter-century since *Williamson* in which a court of appeals has ultimately held that an informant's testimony must be excluded because of the informant's fee arrangement with the government.[3]

As the en banc court recognized (Pet. App. A28-A29), there is no basis for treating contingent fee arrangements any differently from agreements involving accomplice testimony. Any such agreement will inevitably provide a witness with a strong motive to fabricate, and most such agreements will have some element of contingency inherent in them. Certainly, it can reasonably be presumed that prosecuting attorneys promise neither favorable treatment nor compensation without some demonstration that the witness has important evidence to provide. Thus, the decision to enter into the agreement in the first instance is invariably contingent on the prosecutor's estimation of the value of the witness's prospective testimony. Furthermore, a witness who is to be compensated on a basis contingent on his overall performance may subjectively believe that his payment will be higher if his testimony results in a successful prosecution. That is equally true, however, when a cooperating accomplice testifies in anticipation of re-

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[3] Judge Davis also noted the absence of such decisions in his panel dissent (793 F.2d at 700 n.2), which is not reprinted in the appendix to the petition. That dissent also gives numerous reasons (*id.* at 696-701) why exclusion of Kelly's testimony would be inappropriate in this case even if *Williamson* were not overruled.

ceiving favorable sentencing treatment.[4] Although each arrangement enhances a witness's interest in the outcome of the case to some extent, "[a] witness * * * who is paid a fee for his services has less an inducement to lie than witnesses who testify with promises of reduced sentences" (*id.* at A28).

As in the case of other types of testimony by interested persons, the possibility that the witness will provide false testimony in order to obtain benefits under a contingent fee agreement is best addressed by fully revealing the terms of the agreement to the defendant. Once defense counsel has thoroughly explored the terms of the agreement on cross-examination, the jury is in a position to scrutinize the witness's testimony with appropriate care.

Here, the government fully disclosed the nature of its fee arrangement with Kelly, and both Kelly and his supervising case agent were thoroughly examined concerning that arrangement at trial. Moreover, there were substantial indications that Kelly's testimony was reliable. Kelly was a professional informant of established reliability who had provided credible testimony in numerous past cases. See, *e.g.*, *United States* v. *Love*, 767 F.2d 1052, 1056-57 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Merida*, 765 F.2d 1205, 1217 (5th

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[4] As was cogently stated in *United States* v. *Peters*, 791 F.2d 1270, 1300 (7th Cir. 1986), cert. denied, No. 85-7237 (Oct. 6, 1986):

> Conditioning performance of the agreement upon truthful testimony at trial does not encourage exaggeration or lying, but rather serves as a necessary means to ensure truthful compliance with the plea agreement.

The same rationale is equally applicable when, as in this case, a contingent fee agreement is at issue.

Cir. 1985). As the court of appeals further noted (Pet. App. A29), petitioner "admitted virtually all of the facts elicited during Kelly's testimony, much of which was corroborated by other witnesses." [5] It is therefore hardly surprising that petitioner neither asserted in the court of appeals (see *ibid.*) nor argues now that Kelly's testimony was actually false; he merely asserts that the admission of Kelly's testimony created a "risk" of perjury (Pet. 2-3). But, as the en banc court properly held, that risk is one that is properly dealt with through cross-examination and cautionary instructions (see Tr. 389-390, 1498-1499) rather than through a per se rule of exclusion.

At bottom, petitioner's claim rests on his belief that the government should not be permitted to enter into contingent cooperation agreements with witnesses. But "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the man-

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[5] In his panel dissent, Judge Davis pointed out that there was "overwhelming * * * evidence" independent of Kelly's testimony that supported petitioner's conviction (793 F.2d at 697). As Judge Davis explained in detail (*id.* at 697-698), Kelly's testimony was fully validated by that of accomplice Sharp; indeed, because of his limited participation in the conspiracy, Kelly was able to provide testimony concerning only one of the four planned smuggling episodes and concerning events occurring only during the final six weeks of a conspiracy that lasted nearly six months. By contrast, Sharp provided testimony spanning the entire length of the conspiracy. In addition, as Judge Davis observed (*id.* at 698-699), Kelly's version of events was entirely consistent with petitioner's own trial testimony: although petitioner testified that he acted without criminal intent, he verified the events about which Kelly testified. Thus, petitioner was not, as he now suggests (Pet. 2), "convicted on the strength of testimony * * * bought and paid for by the Government."

ner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, 467 U.S. 504, 511 (1984) (footnote omitted). There is no constitutional basis for treating Kelly's testimony differently from that of any other interested witness.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 202037 60179